Supreme Court, U.S.
FILED

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No. 10- OFFICE OF THE CLERK

In The Supreme Court of the United States

ROGER McCORMICK & MARIMAC, LLC,
Petitioner,

v.

DAVID BECHTOL and CATHERINE BECHTOL,
Jointly and severally,
And
JAMES CARTER.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the New York Statute of Frauds, General Obligations Law §5-703 as written or applied violates the 5th and 14th Amendments to the Constitution of the United States.

PARTIES TO THE PROCEEDING

The Petitioners are Roger McCormick for himself and a managing member of Marimac, LLC., the Plaintiffs and Plaintiffs-Appellants in the courts below. The Respondents are David Bechtol and Catherine Bechtol, the Defendants-Respondents/Cross-Appellants and James Carter, the Intervenor-Defendant-Respondent/Cross-Appellant in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Roger McCormick and Marimac, LLC respectfully petition for a writ of certiorari to review the Court of Appeals judgment in this case.

OPINION BELOW

The New York Court of Appeals denial in *Roger McCormick et al. v. David Bechtol et al.* is reprinted in the Appendix at Pet. App. A. The New York State Supreme Court Appellate Division Third Department denial of motion for leave to appeal is reprinted in the Appendix at Pet. App. B. The New York State Supreme Court Appellate Division, Third Department Memorandum and Order is recorded at 68 AD3d 1376 (3rd Dept. 2009) and is reprinted in the Appendix at Pet. App. C. The Decision and Order of the New York Supreme Court, Clinton County is reprinted in the Appendix at Pet. App. D.

JURISDICTION

The New York Court of Appeals opinion was decided on June 24, 2010 and entered with the Court on June 24, 2010. This Court has jurisdiction based upon this Court's authority under the United States Constitution Article III Section 2(1) & (2) to review judgments of the highest courts of a state for violations of United States Constitution by state statute and for declaratory judgment and injunction.

CONSTITUTIONAL PROVISIONS

Amendment 5 and Amendment 14 of the United States Constitution.

STATUTORY PROVISIONS

New York General Obligations Law § 5-703 and in particular, § 5-703(2) which provides in pertinent part that a contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereto authorized in writing.

STATEMENT OF THE CASE

In 1999 Respondent "Carter" induced Petitioners to enter into contracts for purchase of Carter's Marina. Carter was motivated to sell and offered many inducements to Petitioners to buy the marina. Petitioners relied on Carter's representations to purchase the marina, The purchase and other agreements contemplated required Carter to grant Petitioners a right of first refusal to purchase Carter lands contiguous to the marina so that Petitioners could obtain additional land and waterfront to expand the business making it more efficient, profitable and therefore, viable. Without the first refusal rights in the contiguous land and waterfront, the property owned by Carter, the marina, was not commercially feasible. The

right of first refusal was spelled out in the1999 contracts, was a large part of the purchase price and it was an integral part of the deal. In 2005 Respondent Carter did not offer property covered by the Right of First Refusal to Petitioners and, in violation thereof, sold it to Respondents "Bechtol". Petitioners sued Respondents "Bechtol" and Respondent Carter intervened and pled, among other defenses, that the Right of First Refusal violated the NY Statute of Frauds General Obligations Law 5-703(2) and was therefore unenforceable, even though Carter's attorneys prepared the very document they refused to honor as violating of the statute of frauds. Carter retained all consideration for the 1999 contract. The trial court, New York State Supreme Court, Clinton County, and the appellate court, Supreme Court Appellate Division Third Department, agreed and granted and affirmed summary judgment against Petitioners and the New York Court of Appeals refused certiorari. Petitioners were thereby deprived of their property without due process of law by a statute of the New York Legislature which is vague and ambiguous and thus unconstitutional.

Carter failed to allow Petitioners to match an offer to Bechtol on land covered by a clear right of first refusal granted to Petitioners. Further, Carter failed to allow Petitioners to exercise the option rights of Petitioners to pay the difference between the price of that transaction ($145,000) and $350,000 for the purchase of the lakefront property east of Lake Shore Road on both the northern and southern parcels, which was sufficiently described by the real property description contained in Exhibits to the

Right of First Refusal Agreement. This is clear and unequivocal. On this there is no ambiguity.

LEGAL BACKGROUND

Westlaw cites the Third Department Appellate Division decision *McCormick v. Bechtol* as representing the proposition that

> *McCormick v. Bechtol*, 891 N.Y.S.2d 188 (3rd Dept. 2009) Writing will not satisfy the statute of frauds unless it unequivocally establishes all the essential elements of a contractual relationship, such as price, terms, parties, and a description of the subject matter. *McKinney's General Obligations Law § 5-703(2).*

The lower Court held the right of first refusal void for what it found to be an ambiguous price-not in the original 1999 purchase of the Marina, but in the Right of First Refusal formula. *McKinney's General Obligations Law § 5-703(2)* states that a contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereto authorized in writing.

Specific performance of the instant right of first refusal was demanded with other relief in the Second Amended Verified Complaint by Petitioners and Respondents raised the statute of frauds

General Obligations Law 5-703(2) as a defense, incredibly to a document they drafted. The issue of part performance was raised in response to Respondents' motion for summary judgment in the trial court and in their Briefs On Appeal.

On June 24, 2010 the Court of Appeals refused to grant Certiorari on the Decision on February 24, 2010 by the Third Department (Appendix B) of the Appellate Division which refused to allow an appeal to the Court of Appeals sought by Petitioner by Notice of Motion dated January 15, 2010 of it's December 17, 2009 decision (Appendix C) affirming the Decision and Order of Summary Judgment (Appendix D) on July 24, 2008 by the Honorable James Dawson holding that Petitioners' right of first refusal to purchase property contiguously bordering the north and south of the marina was invalid and unenforceable because it failed to give a price on the second sale of part of the property covered by the right of first refusal which, of course, is impossible to determine in any sale covered by a right of first refusal without first obtaining an offer from a third party. Therefore, General Obligations Law §5-703(2), because of its vagueness, deprived Petitioners of their property rights to the lakefront property necessary for expansion without due process of law.

FACTUAL BACKGROUND

In 1999 Respondent Carter induced Petitioners into contracts for purchase of Respondent's Marina. Respondent Carter was motivated to sell and offered many inducements.

Petitioners relied on Carter's representations so that they could obtain additional land and waterfront property owned by Respondent Carter to make the Marina purchased from Respondent Carter commercially feasible. The right of first refusal was spelled out in the contract, was part of the purchase price and was an integral part of the deal. Petitioners were granted first refusal rights on property Carter owned north and south of the marina including shoreline of Lake Champlain. Without the Right of First Refusal, the agreements of 1999 between the parties fail for want of consideration. The right of first refusal was voided by the New York Courts as violating the New York Statute of Frauds General Obligations Law § 5-703.

The Court stated that the right of first refusal is void and unenforceable because it lacks an essential element in that it doesn't address the situation if only one parcel is purchased although otherwise viable and enforceable. *See Judge Dawson's Decision of July 24, 2008, Appendix D.* However, the language of the Right of First Refusal Agreement is clear, no essential term to form and complete the contract is missing, because terms are necessarily adopted and incorporated from the third party offer and furthermore, the parties partly performed the first refusal aspect pursuant to New York General Obligations Law § 5-703(4).

REASONS FOR GRANTING THE WRIT

The New York Court of Appeals held in *Mentz v. Newwitter,* 122 N.Y. 491, 498, (1890) "... that the 'essential, to make a complete agreement, must

consist of the subject-matter of the sale, the terms, and the names or a description of the parties'."

New York General Obligations Law § 5-703 violates the United States Constitution because it deprived Petitioners of property under New York General Obligations Law § 5-703(2) which is unconstitutionally vague and ambiguous. The New York Supreme Court Appellate Division Third Department in the instant matter held that the wording of a contract must be unequivocal to pass the Statute of Frauds test. The Trial Judge characterized to the right of first refusal in the instant matter as void, invalid and unenforceable because it was missing the price of a second exercise of the first refusal right, although otherwise proper.

The right of first refusal was part of the 1999 agreement between the parties. This decision under General Obligations Law § 5-703(2) resulted in a forfeiture of part of the consideration paid by Petitioners and received by Respondent Carter and a taking of Petitioners property rights of future development and devalued any improvements made.

In *Metropolitan Transportation Authority et al v. Bruken Realty Corporation et al.,* 67 N.Y.2d 156 (1986) the Court of Appeals points out that a good reason exists for a contiguous landholder to obtain a first refusal right in that "...enforcement of the preemptive right in such cases encouraged the holder to develop the property by insuring his opportunity to benefit from developing and to recapture his investment in it."

Further, in *Morrison v. Piper,* 77 N.Y.2d 165 (1990) the Court of Appeals stated "...the common law rule of construction...the, unexceptionable

propositions that parties who make grants of real property interests presumably intend their grants to be effective and that reviewing courts should, if at all possible, avoid constructions which frustrate their intended purpose..."

The law does not favor a forfeiture. The writer of *43 Am. Jur. 2d Insurance § 312* states that said principle is but a corollary to the foregoing principle that "courts are liberal in construing transactions in favor of the avoidance of a forfeiture", and the decision reviewed here results in the forfeiture of the Petitioners benefit of his bargain, consideration, value of his labor and improvements and the opportunity to expand his business.

In addition, this Court should grant this motion to grant certiorari because it is necessary to review the vagueness as demonstrated by different applications of New York General Obligations Law 5-703 by the different Departments of the Appellate Division of the New York Supreme Court and to determine whether the part performance exception would apply to these facts to avoid the deprivation of property under a vague unconstitutional standard.

The instant underlying New York decision under review would require crystal clear drafting of every term of any contract for real estate or it will not enforce or allow the contract to be enforced unless the memorandum provides for each and every contingency of each and every element in the Statute. This Court should grant certiorari to proceed to return the task of drafting an adequate and constitutional statute to replace New York General Obligations Law § 5-703.

The New York Statute in effect voided the right of first refusal part of the 1999 contract, stripping the Petitioners of the benefit of their bargain and reducing the value of the purchase of the marina which included a right of first refusal for expansion lands and shoreline.

Statutes should not require the unequivocal wording of essential terms where every possible permutation of any transaction, be specifically spelled out for the contract to be enforceable. This statute does not put the citizens on adequate notice of what is required to satisfy it.

That the statute is vague is substantiated by the different standard set out by the New York State Supreme Court Appellate Division Second Department in the case of *Aceste v. Wiebusch,* 425 N.Y.S.2d 369 (2nd Dept. 1980) which holds that in order to satisfy statute of frauds, memorandum must state the entire contract with reasonable certainty (*emphasis added)*, so that substance thereof will appear from writing alone; it must designate parties, identify and describe subject matter, and state all of the essential terms of complete agreement, including price. In a right of first refusal the price is what the owner and a third party agree. *See also Hackal v. Adler,* 243 A.D.2d 341, 650 N.Y.s.2d 792 (2nd Dept. 1996) and *Omar v. Rozen,* 867 N.Y.S.2d 458 (2nd Dept. 2008).

The Second Department used the term "sufficiently detailed" in its analysis in *Jill Real Estate, Inc. v. Smyles,* 150 A.D.2d 640, 541 N.Y.S.2d 515 (2nd Dept. 1989) to comply with the Statute of Frauds and used the term "substantially the whole agreement" for the same purpose in *Dahm v. Miele,*

136 A.D.2d 586, 523 N.Y.S.2d 851 (2nd Dept. 1988). *Wacks v. King,* 260 A.D.2d 985, 689 N.Y.S.2d 298 (3rd Dept. 1999) found a viable enforceable contract.

The Second Department analyzed General Obligations Law § 5-703 in *Marder's Nurseries, Inc. v. Hopping,* 171 A.D.2d 63, 573 N.Y.S.2d 990 (2nd Dept. 1991) and stated

> The defendant-appellant's two related arguments are both based on the general rule that '[i]f an agreement is not reasonably certain *(emphasis added)* in its material terms, there can be no legally enforceable contract' (*Cobble Hill Nursing Home v. Henry & Warren Corp., 74 NY2d 475, 482 supra,* citing *Martin Delicatessen v. Schumacher,* 52 NY2d 105, 109,*supra;* Restatement [Second] of Contracts § 33 [2][1981]). However, this doctrine has never been applied 'with a heavy hand' (*Cobble Hill Nursing Home v. Henry & Warren Corp., supra* at 483; *see Matter of 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., supra).* Absolute certainty has never been required. Instead, reasonable certainty has always been viewed as sufficient to avoid the 'last resort' 'of canceling an otherwise valid contract' (*Cobble Hill Nursing Home v. Warren & Henry Corp., supra* at 483, quoting *Cohen & Sons v. Lurie Woolen Co.,*

232 NY 112, 114... *See Restatement (First) of Contracts § 207.)*

Additionally, New York General Obligations Law § 5-703 may violate the United States Constitution by impairing the obligation of this contract.

The New York State Appellate Division Third Department, which decided the case under review, required, in the instant case, absolute specificity as to every aspect of the elements required for a valid contract. In fact, the interpretation of New York General Obligations Law § 5-703(2) is so muddled, complicated or confused in the Third Department that, in the case of *Whiteface Resort Holdings*, the opposite result occurred and the right of first refusal was held valid.

In *Whiteface Resort Holdings, LLC v. McCutchen,* 52 A.D.3d 1106, 860 N.Y.S.2d 308, 2008 N.Y. Slip Op. 05627 (3rd Dept. 2008) that Court held that a seller can not defeat a Right of First Refusal by selling less than the entire parcel. Both *Colonie Motors, Inc. v. Heritage Corporation of New York,* 61 A.D.2d 1105 (3rd Dept. 1978) and *New York Tile Wholesale Corp. v. Thomas Fatato Realty Corp.,* 13 A.D.3d 425 (2nd Dept. 2004), hold that a Right of First Refusal is triggered upon an offer for sale of a partial interest in property. *Colonie Motors,* at 576, and *New York Tile Wholesale Corp.,* at 428. The holding in *Colonie Motors* has been applied to prevent an owner from circumventing a Right of First Refusal by conveyance of partial interest whereas in the instant matter the Court used General Obligations Law § 5-703(2) to allow an owner to circumvent the right of first refusal.

In *Whiteface Resort Holdings*, the property was offered to Plaintiff therein, but that Plaintiff expressly declined to buy the property, however the Court held the right effective. In the instant matter that Court ruled the right of first refusal was not effective on any property. That is to say that a partial sale will not defeat a right of first refusal in *Whiteface,* but it will in *McCormick v. Bechtol.*

A right of first refusal is "a restriction on the power of one party to sell without first making an offer of purchase to the other party upon the happening of a contingency: the owner's decision to sell to a third party" (*LIN Broadcasting Corp. v. Metromedia, Inc.,* 74 N.Y.2d 54, 60, 544 N.Y.S.2d 316, 542 N.E.2d 629 (1989)*; see Morrison v. Piper,* 77 N.Y.2d 165, 169-170, 565 N.Y.S.2d 444, 566 N.E.2d 643 [1990])*."*

"It is settled that the grantor of a right of first refusal cannot defeat the right merely by subdividing a parcel into smaller pieces and conveying only partial interests (*see Colonie Motors...)*".

In the Memorandum and Order involving *Whiteface Resort Holdings, LLC v. McCutchen,* 52 A.D.3d 1106, 860 N.Y.S.2d 308, 2008 N.Y. Slip Op. 05627 (3rd Dept. 2008), the court cites the above Colonie Motors decision and writes "this Court has recognized the validity of partial transfers so long as the right of first refusal is honored with each transfer and expressly deemed unreasonable the construction of the word 'premises' as meaning the entire parcel as noted above." Therefore that Court held valid a Right of First Refusal when it could not be determined what the price of the next transaction

would be. The language from *Whiteface* is contrary to its holding in the instant matter reviewed because in *Whiteface* that Court construed its contract, but in the instant case, the Court indicated that any ambiguity violates the New York Statute of Frauds and voided Petitioners' property rights for the right of first refusal because the contract failed to state a price for the second transaction if the entire parcel was not purchased.

All the elements of a valid contract are present in the 1999 agreement and Petitioners are entitled to the property and the benefit of the bargain for the right of first refusal on the contiguous land north and south of the marina.

The price in the instant case was held insufficiently described to comply with the New York Statute of Frauds. The New York Statute of Frauds is unconstitutionally vague and the court's construction violates the 5th and 14th Amendments of the United States Constitution.

Since, as the New York State Supreme Court Appellate Division Third Department has previously held in *Colonie Motors*, the right of first refusal should apply to each partial transfer, it necessarily follows that the essential term of "price" will be determined when an offer is made and accepted between Carter and a third party on the remaining premises, or any part thereof.

The right of first refusal agreement for Petitioners to purchase the "Bechtol property", the property south of the marina and the land east of Lake Shore Road should be enforceable to prevent fraud, injustice and loss of Petitioners' benefit of the bargain and consideration for that part of the

purchase price of the Marina which was for the right of first refusal.

There is no ambiguity as to what price is to be paid for any part of the Premises at any time; it just cannot be stated in advance. It is the price for any portion of the Premises which is offered or accepted by Respondent Carter.

Furthermore, the instant Right of First Refusal in the matter under review addresses more than just the circumstance of, as the New York State Supreme Court Appellate Division Third Department writes in this case: "after receiving a third party offer to purchase the westerly portion of the two parcels together...". That Court's conclusion that the right of first refusal contained in the instant matter applies "only in the event that both the north and south parcels are sold as one" appears to be diametrically opposed to the construction of the word "premises", and the finding of the valid right of first refusal in the *Whiteface Resort Holdings LLC* decision. The "reasonable approach" of the New York Second Department to determine the existence of the essential terms required for General Obligations Law §5-703 as opposed to the "unequivocal" approach of its Third Department and the use of the part performance doctrine to do equity or remand to hear oral testimony, if necessary, should be ordered to prevent an injustice or resolve a perceived inequity. All of the difficulty that the Courts and lawyers have had in this matter to draft a contract to comply with New York General Obligations Law § 5-703(2) proves the failure of it to advise parties how to comply with its requirements. The New York General Obligations Law § 5-703(2)

should be struck as written and Petitioners' property rights be returned, unvoided, made enforceable and this matter remanded.

This Court held in the case of *Zwickler v. Koota*, 389 U.S. 241 (1967) that a Statute is void for vagueness which forbids or requires doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

In the case of *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967) this Court held that void for vagueness doctrine is applicable to civil as well as criminal actions where exaction of obedience to rule or standard is so vague and indefinite as really to be no rule at all, i.e., where exaction strips participant of rights.

Additionally, this Court stated in the case of *Buchanan v. Warley*, 245 U.S. 60 (1917) that within this clause "property" is more than the mere thing which a person owns and includes the right to acquire, use, and dispose of it, and these essential attributes of property are protected by the Constitution.

CONCLUSION

New York State General Obligations Law § 5-703 is vague and inconsistent even for lawyers and is further shown to be so by the varied and different Judge's decisions regarding compliance and its applications. Petitioners and Respondents case was dismissed in summary judgment as a matter of law without referral to a jury to determine whether statutory requirements were fulfilled.

The Statute of Frauds was designed to prevent frauds, not to cause an inequitable forfeiture and Petitioner was deprived of his property on account of a vague statute which has no fixed standards.

This Statute is so marred that the lawyers who drafted the Right of First Refusal Agreement didn't know it was unsuitable as vague and deficient in definitions and lacking of adequate notice for New York General Obligations Law § 5-703 (2). It is void both on its face and as applied here.

The Petition should be granted.

Respectfully Submitted,

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APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court of Appeals Hall in the Coty of Albany on the twenty-fourth day of June, 2010

Present, HON. JONATHAN LIPPMAN, *chief Judge, presiding*

Mo. No. 2010-424

ROGER MCCORMICK et al.,
Appellants

v.

David Bechtol et al.,
Respondents

A motion for leave to appeal to the Court of Appeals in the above cause having been made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

/s/
Stuart M. Cohen
Clerk of the Court

APPENDIX B

STATE OF NEW YORK
SUPREME COURT, APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: February 24, 2010
Case # 506411

ROGER MCCORMICK et al,
Appellants-Respondents,

v.

DAVID BECHTOL et al,
Respondents-Appellants.

DECISION AND ORDER ON MOTION

Motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

MERCURE, J.P., KAVANAGH, STEIN, McCARTHY and GARRY, JJ., concur

ENTER:
/s/
Michael J. Novack
Clerk of the Court

APPENDIX C

STATE OF NEW YORK
SUPREME COURT, APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: December 17, 2009

506411

ROGER MCCORMICK et al,
Appellants-Respondents,

v.

DAVID BECHTOL et al,
Respondents-Appellants.

MEMORANDUM AND ORDER

Calendar Date: October 20, 2009

Before: Mercure, J.P., Kavanagh, Stein, McCarthy and Garry, JJ.

Alan Weinraub, Champlain, for appellants-respondents.

Stephen A. Johnston, Plattsburgh, for David Bechtol and another, respondents-appellants.

O'Connell & Aronowitz, P.C., Plattsburgh (Erin R. Mindoro of counsel), for James Carter, respondent-appellant.

Mercure, J.P.

Cross appeals from an order of the Supreme Court (Dawson, J.), entered August 12, 2008, which, among other things, granted defendants' cross motions for summary judgment dismissing the complaint.

In 1999, plaintiff Marimac, LLC entered into an agreement to purchase real property, including a marina, from defendant James Carter. Plaintiff Roger McCormick, as a member of Marimac, signed the agreement on its behalf. Included in the agreement was a right of first refusal, in which Carter agreed to notify Marimac of any third party offers to purchase two properties adjoining the parcel purchased by Marimac. The two properties, which are not contiguous and had separate tax identification numbers, consisted of an approximately 15-acre parcel located north of Marimac's property and a six-acre parcel located to the south of Marimac's property. Each of the two parcels is also divided into an easterly and westerly portion by a road, with lakefront property located to the east of the road. The right of first refusal addressed the circumstances under which Carter, after receiving a third-party offer to purchase the westerly portion of the two parcels together, would either transfer or offer to sell the easterly lakefront portion of the two parcels to Marimac.[1] Notably, the

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[1] Specifically, if Carter was able to sell the westerly portion of the two parcels for $350,000 or more, he was to transfer the easterly, lakefront portion of the two parcels to Marimac

right of first refusal did not address the sale of either of the two parcels separately.

Although the purchase agreement was executed in 1999 and Marimac began operating the marina pursuant to an early occupancy agreement, the closing on the property did not occur until 2001. At that time, Carter transferred title to Marimac; the right of first refusal, however, was not referenced in the deed. Nor was the right of first refusal included in an affidavit executed by Carter at the time of closing that specified which representations in the purchase agreement were intended to be reaffirmed. McCormick, however, recorded an affidavit that was not signed by Carter, indicating that a right of first refusal attached to the sale of the two parcels.

In 2007, Carter sold the entire six-acre parcel – located on both sides of the dividing road and to the south of Marimac's property – to defendants David Bechtol and Catherine Bechtol without first notifying Marimac. Thereafter, plaintiffs commenced this action against the Bechtols – and Carter after he was joined as a party – seeking specific performance, as well as damages arising from Carter's alleged breach of the right of first refusal and the Bechtols' alleged tortious interference with the right. Following joinder of issue, the parties cross moved for summary judgment. Supreme Court concluded that the right

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without consideration. If Carter received an offer of less than $350,000, he was to grant Marimac the option to purchase the easterly portion of the two parcels for an amount computed by subtracting the price that Carter received for the westerly portion of the two parcels from $350,000.

of first refusal contained in the purchase agreement did not comply with the statute of frauds and, thus, denied plaintiffs' motion and granted defendants' cross motions. Plaintiffs appeal, and we now affirm.[2]

Plaintiffs argue that Supreme Court erred in concluding that the right of first refusal was unenforceable under the statute of frauds. We disagree.

A right of first refusal "requires [an] owner, when and if he [or she] decides to sell, to offer the property first to the party holding the preemptive right so that he [or she] may meet a third party offer or buy the property at some other price set by a previously stipulated method" (Metroploitan Transp. Auth. V Bruken Realty Corp., 67 NY2d 156, 163 [1986]; see Cipriano v Glen Cove Lodge #1458, B.P.O.E., 1 NY3d 53, 60-61 [2003]). A right of first refusal is subject to the statute of frauds, which provides that "[a] contract...for the sale[] of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof,

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[2] Defendants cross-appeal on the limited ground that Supreme Court erred in rejecting their arguments that they were entitled to summary judgment because Marimac failed to disclose the right of first refusal in its chapter 11 bankruptcy proceeding and any right of first refusal is void pursuant to the doctrine of merger in any event. Inasmuch as defendants were nor aggrieved by the court's order, their cross appeals are dismissed (see Parochial Bus Sys. V Board of Educ. Of City of N.Y., 60 NY2d 539, 544-546 [1983]; Matter of Eck v County of Delaware, 36 AD3d 1180, 1181 n [2007]). Moreover, although defendants' arguments are properly before us as alternative grounds for affirmance, they are academic in light of our decision to affirm and we do not reach the merits of those arguments.

expressing the consideration, is in writing, subscribed by the party to be charged" (General Obligation Law § 5-703 [2]). Specifically, a writing will not satisfy the statute of frauds unless it "unequivocally establish[es] all the essential elements of a contractual relationship...such as price, terms, parties and a description of the subject matter" (Syman v Vanderheuval, 249 AD2d 870, 872 [1998] [internal quotation marks and citation omitted]; see Pfeil v Cappiello, 29 AD3d 1187, 118 [2006]; Wacks v King, 260 Ad2d 985, 986-987 [1999]).

Here, the agreement set forth a method for calculating the price of the easterly, lakefront portion of both the north and south parcels together in the event that Carter sold the westerly portion of both parcels together. That is, the right of first refusal provides a method of price calculation only in the event that both the north and south parcels are sold as one. It provides no indication of the price that Marimac was to pay if Carter received an offer on only one of the two adjoining parcels, or if he sold both the easterly and westerly portions of either parcel. Moreover, while it is settled that the grantor of a right of first refusal cannot defeat the right merely by subdividing a parcel into smaller pieces and conveying only partial interests (see Colonie Motors v Heritage Corp. of N.Y., 61 Ad2d 1105, 1107 [1978]; Sargent v Halsey, 42 Ad2d 375, 379 [1973]), plaintiffs do not dispute that the agreement at issue here permits the sale of only one of the adjoining parcels. Accordingly, we agree with the Supreme Court that the right of first refusal is missing an essential term of a complete agreement – the price to

be paid for the easterly, lakefront portion of one or both parcels if Carter sold only one of the two adjoining parcels. As such, the agreement is insufficient to satisfy the statute of frauds (see Pfeil v Cappiello, 29 Ad3d at 1188; Bright beginnings Day Care, Inc v Driftwood Day Camp, Inc., 16 AD3d 449, 449 [2005]; Syman v Vanderheuval, 249 AD2d at 872; see also O'Brien v West, 199 AD2d 369, 371 [1993]; cf. Wacks v King, 260 AD2d at 987; Jill Real Estate v Smyles, 150 AD2d 640, 641-642 [1989]).

Finally, contrary to their argument, plaintiffs' actions were not sufficient to support invocation of the part performance exception to the statute of frauds (see General Obligations Law § 5-703 [4]). Under the part performance doctrine, "it is the conduct of the entity seeking to enforce the oral agreement, and its detrimental reliance on the agreement, that makes proper the invocation of equitable principles" (Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group, 93 NY2d 229, 236 [1999]; see Anostario v Vicinanzo, 59 NY2d 662, 664 [1983]). Furthermore, "[t]he doctrine of part performance may be invoked only if plaintiff[s'] actions can be characterized as 'unequivocally referable' to the agreement alleged' (Anostario v Vicinanzo, 59 NY2d at 664; see Gilligan v Rehm, 34 AD2d 711, 712 [1970], lv denied 27 NY2d 485 [1970]). The actions upon which Plaintiffs rely – Marimac's occupancy and investment in the premises that they owned – do not resolve the ambiguity created by the absence of a relevant price term and, in any event, cannot form a basis for avoidance of the statute of frauds because they are not unequivocally referable to the agreement (see

Anostario v Vicinanzo, 59 NY2d at 664; Venture Mfg. [Singapore] v Matco Group, 6 AD3d 850, 851 [2004]).

We have considered plaintiffs' remaining arguments and conclude that they are lacking in merit.

Kavanagh, Stein, McCarthy and Garry, JJ. Concur.

ORDERED that the order is affirmed, with one bill of costs to defendants.

ORDERED that the cross appeals are dismissed.

ENTER:
/s/
Michael J. Novack
Clerk of the Court

APPENDIX D

STATE OF NEW YORK
SUPREME COURT, COUNTY OF CLINTON

ROGER MCCORMICK AND MARIMAC, LLC.
jointly and severally,
Plaintiffs,

v.

DAVID BECHTOL and CATHERINE BECHTOL,
jointly and severally, and JAMES CARTER,
Defendants.

DECISION AND ORDER

Index No. 2007-1351
RJI No. 09-1-07-0595

[Graphic-County Clerk Recording Stamp]

Alan Paul Weinraub, Rouses Point, for Plaintiffs

Stephen A. Johnston, Plattsburgh, for Defendants David and Catherine Bechtol.

O'Connell & Aronowitz, P.C., Plattsburgh (*William A. Favreau*, of counsel), for Defendant James Carter.

JAMES P. DAWSON, J.

The Court is asked to resolve the Plaintiffs' motion for summary judgment, as well as the Defendants' cross-motions for summary judgment, in this action involving a property dispute. The Defendant James Carter owned several adjoining parcels of real property in the Town of Chazy, Clinton County. In October 1999, the Plaintiff Marimac, LLC and Carter entered into a sale agreement for some of that real property, on which is a marina. Among other things, Carter granted Marimac a right of first refusal should Carter receive an acceptable offer from a third party to buy the adjoining parcels. At the same time, the parties entered into an early occupancy agreement which allowed Marimac to rent the marina prior to purchasing it.

The purchase agreement specified that a closing must be held no later than December 1, 2000 and allowed, but did not obligate, Carter to void the purchase agreement if that date passed. That date passed without a closing, but the sale nevertheless went forward. In February 2001, Carter executed an affidavit wherein he reaffirmed "certain covenants, representations and warranties" from the purchase agreement and conveyed the marina to Marimac by deed. The right of first refusal was never recorded. In 2003, however, the Plaintiff Roger McCormick recorded his own affidavit indicating that he has assigned the right of first refusal to himself.

This action was commenced after Carter conveyed one of the adjoining parcels to the Defendants David and Catherine Bechtol without notifying Marimac or McCormick. The Plaintiffs

initially commenced this action solely against the Bechtols, but Carter successfully moved to intervene. The second amended complaint seeks an injunction prohibiting construction on the parcel (first cause of action), damages for tortious interference with contract (second cause of action) and a declaratory judgment that the Plaintiffs' rights in the parcel are superior to that of the Bechtols (third cause of action). Claims for breach of contract (fourth cause of action) and specific performance (fifth cause of action) are also asserted. The Defendants served answers.

The Plaintiffs now move for summary judgment, arguing that there is no question of fact regarding the effectiveness of the right of first refusal. Carter and the Bechtols separately cross-move for summary judgment dismissing the complaint, making mostly similar arguments that will be addressed in greater detail below. The Plaintiffs submitted a legal memorandum in reply. Carter submitted a sur-reply which is nor permitted by CPLR 2214 and will not be considered.

The Plaintiffs' motion is denied and the Defendants' cross motions are granted. The Defendants first argue that Marimac's failure to list the right of first refusal as an executory contract in its bankruptcy proceeding rendered the right of first refusal invalid. An unexercised right of first refusal may or may not be an executory contract for purposes of the bankruptcy code (*compare Matter of Kellstrom Indus.*, 286 BR 833, 834-835 [2002], *and Matter of Coordinated Fin. Planning Corp.*, 65 BR 711, 713 [1986], *with Matter of Bergt*, 241 BR 17, 19-20 [1999]). Assuming that it is, Marimac failed to

disclose its existence on a schedule of executory contracts in the bankruptcy proceeding as required (*see* Fed Rules Bankr Pro rule 1007[b]). The trustee failed to take any specific action with regard to the right for the simple reason that the trustee did not know the right existed. Contrary to the Defendants' argument, the automatic rejection of 11 USC § 365 (d) does not apply under these circumstances, as "[a] trustee cannot be deemed to have rejected a contract of which he was not aware and which was not listed in the debtor's schedules' (*Matter of Zuniga,* 287 BR 201, 206 [2001]). The right of first refusal has not been rejected.[3]

The Defendants' next argument is that the Plaintiffs' failure to record either the right of first refusal, a suitable memorandum thereof, or the subsequent assignment of the right of first refusal renders them void. The original memorandum regarding the right of first refusal fell far short of that required by Real Property Law § 294 (2), which specifies that any memorandum be executed by all of the parties. However, having said that, the failure to record only renders the right of first refusal void as against anyone who subsequently acquires the subject property "in good faith and for a valuable consideration" (Real Property Law § 294 [3]). It is

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[3] Carter also argues that he had the option of consenting or rejecting the assignment from Marimac to McCormick (*see* 11 USC § 365 [c]). The relevant language discussed the situation where the trustee can assign an executory contract. "An executory contract is not subject to section 365, however, when the debtor fails to disclose the existence of the contract on her bankruptcy schedules" (*Matter of Zuniga,* 287 BR 201, 206 [2001]).

not void as against Carter, who is not a subsequent purchaser. Nor is it void against the Bechtols. "The status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property, or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such" (*Chen v. Geranium Dev. Corp.*, 243 AD2d 708, 709 [1997], *lv dismissed* 91 NY2d 921 [1998]). In this case, McCormick's affidavit setting out Marimac's right of first refusal was recorded in 2001, well before the Bechtols purchased the property. Indeed, the Bechtols admitted in their affidavit opposing the Plaintiffs' previous preliminary injunction motion that they had been told at their closing that "there might be a little problem," although they apparently made no further inquiry and the situation was downplayed by their attorney (Bechtol affidavit of 11/30/2007, ¶ 12, attached as exhibit to Plaintiffs' motion). The fact that such an affidavit was recorded, coupled with the Bechtols' admitted knowledge of a problem, would have led a reasonably prudent purchaser to inquire about the existence of a right of first refusal.

Carter separately argues that the right of first refusal was extinguished after Marimac declined to exercise it in two previous instances where a third party made an acceptable offer to purchase the property. It is undisputed that neither offer resulted in the sale of the property. There is no question that the right of first refusal could be extinguished under those circumstances, but such is determined by the language of the agreement itself (*see e.g. McPeady & Co. v Chestnut St. Props.*, 179 AD2d 915, 917

[1992]). The effect of Marimac's actions depends upon the language of the right of first refusal itself and the Court cannot look beyond its terms if they are clear (*see Matter of Delmar Pediatrics Asthma & Allergy Care*, 35 AD3d 987, 988 [2006]). There is no language in the agreement expressly stating when the right is extinguished or otherwise what will happen if Marimac declines to exercise the right but the proposed sale does not go forward. Having said that, the right of first refusal does state that, "[i]f Purchaser fails to accept the offer of the Seller, the Seller may transfer his interest in the property to a third party who either has made an offer or accepted the offer of Seller to purchase the premises." The use of the past tense - a party who "has made an offer or accepted" one – indicates that the right of first refusal is only waived on offers that have already been made or accepted. In other words, the right of first refusal is only waived with regards to the offer that triggered it to begin with. Assuming there was some ambiguity, the Court would be obligated to consider extrinsic evidence to determine the parties' intent (*see id.).* Carter now suggest that the parties intended Marimac's right to be extinguished after the first offer, but he put Marimac on notice for the second offer. Also, Marimac made clear in both instances that its understanding was that "[i]f the current Purchase Offer is not consummated...the Right of First Refusal" will remain effective (Carter affidavit, Exhs C, D). Were there any ambiguity in the agreement's language, a question of fact would exist as to whether the right of first refusal was extinguished.

As for the Defendants' argument regarding the Rule Against Perpetuities, there is little question here that the remoteness of vesting portion of the rule has been violated (*see Emmons v. Trout Lake Club,* 194 AD2d 160, 162 [1993]). Having said that, the rule "does not apply to preemptive rights [such as a right of first refusal] in commercial and governmental transactions" (*Metropolitan Transp. Auth. V. Bruken Realty Corp.*, 67 NY2d 156, 168 [1986]).[4] The Defendants argue that this is not a commercial transaction, but this is not supported by the evidence. Marimac leased and later purchased a marina from Carter and the right of first refusal on the adjacent parcels is a part of that commercial transaction. McCormick states that he would not have purchased the marina without the right of first refusal, as the marina had little value unless there was the possibility of future expansion on the adjacent parcels. In short, to apply the rule to this transaction "would defeat the policies underlying the rule because it would invalidate an agreement which promoted the use and development of the property while, at the same time, imposing only a minor impediment to free transferability" (*id.* at 166). The commercial exception to the Rule Against Perpetuities applies.

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[4] To the extent the Plaintiffs argue that the Defendants have waived any defense based upon the Rule Against Perpetuities, the Court notes that the issue can be raised at any time by a party or even raised by the Court *sua sponte* given that indefinite restraints on alienation violate the public policy of the State (*see Brousal v. Schmukler,* 154 AD2d 494, 494-495 [1989], *lv dismissed* 75 NY2d 865 [1990]).

Although the Rule Against Perpetuities is inapplicable, the common-law rule against unreasonable restraints does apply (*see id.* at 168). "Under the rule prohibiting unreasonable restraints on alienation, the validity of the preemptive right rests on its reasonableness, judged by its duration, price and purpose." With its duration not being measured by the life of the right but rather by the period during which the right can be exercised after it is triggered (*id.* at 167). The purpose is a reasonable commercial one and seeks to allow for expansion of the marina. The duration of the right, which gave Marimac 30 days to exercise its right after being notified of a third-party offer, is not onerous. Carter does argue that the fixed price agreement is unreasonable. The price terms are convoluted. It states that, if Carter sells both adjoining parcels for more than $350,000, he shall convey the lake frontage to Marimac for no consideration. If that portion of the parcels west of the Lake Shore Road (in other words, excepting the lake frontage) is sold for less than $350,000, Marimac may purchase the lakefront property for the difference between the sale price and $350,000. In either case, the third party purchaser would have an easement across Marimac's property to access the lake. Carter provides no proof as to what the fair market value of the two parcels combined is and has not established as a matter of law that the price to be paid is unreasonable (*cf. Herrmann v. AMD Realty,* 8 AD3d 619, 621-622 [2004]).

The Defendants' next argument relates to the doctrine of merger.[5] "Generally, the obligations and provisions of a contract for the sale of land are merged in the deed and, as a result, are extinguished upon the closing of title" (*Davis v. Weg,* 104 AD2d 617, 619 [1984]; *see 1455 Washington Ave. Assoc. v. Rose & Keirnan, Inc.,* 260 AD2d 770, 771 [1999]). This general doctrine "does not apply where there is a clear intent evidenced by the parties that a particular provision shall survive delivery of the deed, or where there exists a collateral undertaking" (*Davis v. Weg,* 104 AD2d at 619; *see Alexy v. Salvador,* 217 AD2d 877, 878 [1995]). In this case, a clear intent to the contrary is apparent from Carter's providing Marimac with the notice required in the right of first refusal on two separate occasions after the deed was recorded and Marimac's response on both occasions.

Carter also argues that the Plaintiffs have abandoned their claim for tortious interference by failing to raise it on their summary judgment motion. "A motion for summary judgment must be addressed to one or more specific causes of action or defenses" and the Plaintiffs failure to reference one claim does not waive it or otherwise entitle the Defendants to its dismissal (*Conroy v. Swartout,* 135 AD2d 945, 947 [1987]).

The Defendants argue that, because Carter did not convey all of the property subject to the right of first refusal, the right does not attach. A right of

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[5] While making his Rule Against Perpetuities argument, Carter also makes reference to an alleged lack of consideration in the right of first refusal agreement. Consideration of $1 was paid, according to the agreement, and such is sufficient.

first refusal does attach to a partial sale of the subject property (*see Whiteface Resort Holdings v. McCutchen,* ___ AD3d ___, 2008 NY Slip Op 05627, *2-3 [3rd Dept. 2008]).

A related argument, raised specifically by Carter, has more merit. The Statute of Frauds applies to a right of first refusal (*see* General Obligations Law § 5-703; *Pfeil v. Cappliello,* 29 AD3d at 1188 [2006]). Accordingly, the written agreement must name all of the parties to it (*see Pfeil v. Cappiello,* 29 AD3d at 1188). In this case, the right of first refusal covers two separate parcels but discusses the sale price and use of the parcels as one. Carter only sold one of the parcels to the Bechtols. Given the specific price terms in the agreement, it lacks the essential term addressing what price is to be paid if only one of the parcels is sold. The right of first refusal agreement violates the Statute of Frauds and is unenforceable (*see Regan v. Real Source Charities*, 45 AD3d 1156, 1157-1158 [2007]). As all of the Plaintiffs' claims presuppose a valid right of first refusal, the complaint must be dismissed.

Given the above, the Defendants' arguments regarding the need for more discovery and the reasons why the Plaintiffs have not met their burden for summary judgment are academic.

ORDERED that the Plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that the Defendant James Carter's and Defendants David and Catherine Bechtols' cross-motion for summary judgment are granted, and the complaint is dismissed. Any relief requested

which is not specifically granted herein is denied, and no motion costs are awarded to any party.

The original of this Decision and Order, together with the papers supplied, are returned to the Defendant James Carter's attorneys for filing and service with notice of entry. Those papers consist of the following: notice of motion dated June 11, 2008; affirmation of Alan Weinraub dated June 11, 2008, with exhibit; affidavit of Roger McCormick, sworn to June 5, 2008, with exhibits; notice of cross-motion dated June 20, 2008; affirmation of Stephen A. Johnston dated June 20, 2008; affidavit of David Bechtol and Catherine Bechtol, sworn to June 20, 2008, with exhibits, notice of cross-motion dated June 26, 2008; affidavit of William A. Favreau, sworn to June 26, 2008, with exhibits; affidavit of James D. Carter, sworn to June 26, 2008, with exhibits; letter of Stephen A. Johnston dated July 2, 2008.

Decided: July 24, 2008

/s/
James P. Dawson, JSC

Enter: